



WENDI S. BIERLING

185 IBLA 257

Decided April 8, 2015



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

WENDI S. BIERLING

IBLA 2015-98

Decided April 8, 2015

Appeal from and petition for a stay of the effect of a letter-decision of the Field Manager, Northeastern States Field Office, Eastern States, Bureau of Land Management, denying appellant's request to purchase or adopt additional wild horses and formally declaring her ineligible to receive any wild horses, by adoption or purchase, because of prior inhumane treatment of wild horses.

Appeal dismissed; petition for stay denied as moot.

1. Administrative Appeals–Appeals: Jurisdiction–Board of Land Appeals–Rules of Practice: Appeals: Jurisdiction

The Board will dismiss an appeal, filed pursuant to 43 C.F.R. § 4770.3(a) from a final decision of the Bureau of Land Management, disapproving a request for additional wild horses and burros pursuant to 43 C.F.R. § 4770.2(b) when the appellant challenging the decision fails to comply with the applicable appeal regulations of the Board at 43 C.F.R. §§ 4.411(a) and 4770.3(a), which require an appeal to be filed within 30 days following the date of service of the decision on the appellant. In such circumstances, the Board is deprived of jurisdiction to adjudicate the appeal.

APPEARANCES: Wendy S. Bierling, Allegan, Michigan, *pro se*; Stephen G. Mahoney, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Wendy S. Bierling has appealed from and petitioned for a stay of the effect of a December 22, 2014, letter-decision of the Field Manager, Northeastern States Field Office (Field Office), Eastern States, Bureau of Land Management (BLM), denying her request to purchase or adopt additional wild horses and formally declaring her ineligible to adopt or purchase any wild horses because of prior inhumane treatment of wild horses, pursuant to section 3 of the Wild Free-Roaming Horses and Burros Act

(WFRHBA), 16 U.S.C. § 1333 (2012), and 43 C.F.R. Part 4700.¹ Because appellant failed to timely file an appeal, BLM's motion to dismiss is granted. 43 C.F.R. § 4.411.

Background

On December 9, 2010, Bierling purchased 29 wild horses from BLM. Administrative Record (AR), Tab 6 (Bill of Sale, dated Dec. 16, 2010). Sometime thereafter, BLM informally determined Bierling to be ineligible for future adoptions or purchases of wild horses under the jurisdiction of BLM and listed her on the Wild Horse and Burro Information System (WHBIS). See 43 C.F.R. § 4750.3-2(b).² Thus, when Bierling applied to adopt or purchase additional wild horses from BLM in December 2014, BLM declined to grant them. See Decision at unpaginated (unp.) 1; Response at 4.

The Field Manager formally rejected those applications in the letter-decision, listing numerous inspections and record documentation of inhumane treatment of

¹ In her very brief notice of appeal, Bierling requested a stay, "for at least 30 more days, with which to gather sufficient evidence in regards to my appeal." Since, in her notice of appeal, Bierling provides no reason in support of the appeal nor attempts to satisfy the stay criteria of 43 C.F.R. § 4.21(b)(1), but expresses the need for time to prepare her appeal, the request is more in the nature of a request for an extension of time to file a statement of reasons (SOR) for appeal, rather than a request for a stay. See Response to Stay Request (Response) at 5. The Board took no action, and the 30 days Bierling requested for an extension have elapsed. In any case, given the Board's disposition, the request for stay is denied as moot.

² 43 C.F.R. § 4750.3-2(b) states that BLM "shall determine an individual's qualifications [to receive a wild horse for private maintenance] based upon information provided in the application form required by [43 C.F.R.] § 4750.3-1 . . . and [BLM] records of any previous private maintenance by the individual under the [WFRHBA]." (Emphasis added.) Section (A)(1)(e) of Chapter V of the BLM Manual Handbook H-4760-1 (Conducting Compliance Checks for BLM's Wild Horse and Burros Adoption Program) (Rel. 4-108 (7/17/04)) (Handbook) provides for the establishment of ineligibility lists, as follows:

When an adopter is *determined to have violated the terms of a PMACA [Private Maintenance and Care Agreement], either through administrative or judicial action*, his/her name is placed on the ineligibility list in the [WHBIS]. Offices must consult this list when considering applications for adoption to ensure that future applications for these individuals are not approved. [Emphasis added.] Handbook at V-2.

wild horses. Decision at unp. 1; Response at 1-4, 7-9. The record is replete with photographic and other evidence of inhumane treatment of wild horses, which Bierling had purchased from BLM. Stating that “[t]reating a wild horse . . . inhumanely” constitutes a “prohibited” act, under 43 C.F.R. § 4770.1, the Field Office informed Bierling that, “because there is more than sufficient evidence in both verbal and written statements, as well as photographic evidence, that [she] previously neglected wild horses to the point of severe malnutrition and emaciation,” her recent applications to adopt wild horses were denied and any future applications to adopt or purchase wild horses would be denied. Decision at unp. 2.

Discussion

[1] On December 23, 2014, Bierling received a copy of BLM’s December 2014 letter-decision. See Page 2 of Form 1842-1 (September 2006) attached to Notice of Appeal (NOA) (“This is the form (and only this) was what I received in mail with the letter from the BLM’s Field Manager . . . on December 23, 2014”). Under 43 C.F.R. § 4.411(a), Bierling had until January 22, 2015, to file an appeal from the letter-decision--30 days after service of the letter-decision. See 43 C.F.R. § 4770.3(a). During regular business hours on January 23, 2015, 1 day after the 30-day deadline, Bierling filed a copy of the notice of appeal, with the Eastern States Office, BLM, by means of a facsimile transmission.³

Bierling’s filing is not entitled to a waiver of the deadline for filing, in accordance with the 10-day grace period established by 43 C.F.R. § 4.401(a). Although filed within 10 days of that deadline, we find no evidence this NOA was “transmitted or probably transmitted to the office in which the filing is required *before the end of the period in which it was required to be filed,*” that is, before January 22, 2015. (Emphasis added.) 43 C.F.R. § 4.401(a).

³ Having inquired of BLM, we have learned that no original notice of appeal was ever filed with BLM by mail, in person, or delivery service. While a transmission receipt showing that a facsimile was transmitted would not constitute proof of receipt by BLM, BLM states that it received the NOA by facsimile on Jan. 23, 2015, and its statement is borne out by evidence in the record. See *National Wildlife Federation*, 162 IBLA 263, 266-67 (2004); Response at 5. BLM provides a Jan. 26, 2015, e-mail from Justin Katusak, State Litigation Coordinator/Land Law Examiner, Eastern States Office, to Stephen Mahoney, Office of the Field Solicitor, to which Katusak appended “a copy of Wendi S. Bierling’s Notice of Appeal and Request for Stay,” which included a Jan. 23, 2015, “FAX RX REPORT,” which reports receipt of a facsimile transmission of 6 pages on Jan. 23, 2015. The only proof of when the notice of appeal was actually transmitted to and received by BLM is that FAX RX REPORT. Bierling offers no evidence to the contrary.

We have long held that the timely filing of an appeal from a BLM decision is necessary to establish the jurisdiction of the Board to decide the appeal, under 43 C.F.R. § 4.411. See 43 C.F.R. § 4.411(c); e.g., *Southern California Sunbelt Developers, Inc.*, 154 IBLA 115, 117 (2001); *Lew Landers*, 109 IBLA 391, 392 (1989). When the Board lacks jurisdiction, because an appeal is not timely, we must dismiss the appeal. *Southern California Sunbelt Developers, Inc.*, 154 IBLA at 117-18; *Lew Landers*, 109 IBLA at 392-93. In these circumstances, it is immaterial that the party appealing may have made a good faith effort to comply with the appeal regulation, the appeal has merit, or no party was prejudiced by the late filing, since the Board cannot overcome the absence of jurisdiction, under 43 C.F.R. § 4.411. See *ANR Production Co.*, 118 IBLA 338, 343 (1991); *Ron Williams Construction Co.*, 124 IBLA 340, 341-42 (1992) (citing *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978) (“strict adherence to the rule [43 C.F.R. § 4.411(a)] is required”)).

The Board will dismiss an appeal from a final decision, disapproving a request for additional wild horses and burros pursuant to 43 C.F.R. § 4770.2(b), when the appellant challenging the decision fails to comply with the applicable appeal regulations of the Board at 43 C.F.R. §§ 4.411(a) and 4770.3(a), which require an appeal to be filed within 30 days following the date of service of the decision on the appellant. In such circumstances, the Board is deprived of jurisdiction to adjudicate the appeal. Since Bierling’s appeal was not filed timely with BLM, it must be dismissed.

Even if Bierling had timely filed her NOA, we would dismiss it because, to date, she has not filed a statement of reasons (SOR) for her appeal, required by 43 C.F.R. § 4.412. Her NOA simply states: “I believe I have sufficient evidence that there are several incorrect statements and findings” in the letter-decision. NOA. We have long held that, in order to constitute an acceptable SOR, an NOA or other document must affirmatively point out in what particular respect BLM erred in making the challenged decision. See, e.g., *Burton A. McGregor*, 119 IBLA 95, 98 (1991).

Bierling does no more than assert error in the decision appealed. Therefore, her NOA cannot be considered an SOR. Under 43 C.F.R. § 4.412(a), Bierling’s deadline for filing an SOR with the Board was February 22, 2015, a Sunday, and thus the deadline was extended to the next business day, in accordance with 43 C.F.R. § 4.22(e). Bierling has filed nothing more, nor offered any reason for failing to file an SOR. See *supra*, note 1. Such failure subjects an appeal to summary dismissal, pursuant to 43 C.F.R. §§ 4.402 and 4.412(c). See, e.g., *Nevada Outdoor Recreation Association, Inc.*, 153 IBLA 8, 11 (2000); *Shogun Oil Ltd.*, 136 IBLA 209, 212 (1996); *Burton A. McGregor*, 119 IBLA at 97-98; *Robert L. True*, 101 IBLA 320, 324 (1988).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal of the Field Office's December 2014 letter-decision is dismissed as untimely, and the petition for a stay is denied as moot.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge